Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Comcast Corporation	)	CSR-7012-Z
	)	
Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Application for Review	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 2007 **Released: September 4, 2007**

By the Commission: Commissioner Copps issuing a statement; Commissioners Adelstein and McDowell concurring and issuing a joint statement.

I. INTRODUCTION

1. Comcast Corporation ("Comcast") seeks review[1] of the Media Bureau's decision in the above-captioned proceeding.[2] The Bureau denied Comcast's request[3] for waiver of the ban on integrated set-top boxes,[4] finding that the boxes for which Comcast sought waiver (the "Subject Boxes") are not eligible for relief under (1) Section 629(c) of the Communications Act of 1934, as amended (the "Act");[5] (2) the waiver policy established by the Commission for low-cost, limited-capability devices;[6] and/or

[1] Application for Review of Comcast Corporation (filed January 30, 2007) ("Application for Review"); *see also* 47 C.F.R. § 1.115.

[2] *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, DA 07-49 (MB rel. Jan. 10, 2007) ("*Order*").

[3] Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7012-Z, CS Docket No. 97-80 (April 19, 2006) ("Waiver Request").

[4] 47 C.F.R. § 76.1204(a)(1).

[5] 47 U.S.C. § 549(c).

[6] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6813-14, ¶ 37 (2005) ("*2005 Deferral Order*"), *pet. for review denied*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

(3) Sections 1.3 and 76.7 of the Commission's rules.[7] As set forth below, we deny Comcast's Application for Review and affirm the Bureau's *Order*.

II. BACKGROUND

2. Congress directed the Commission to adopt regulations to assure the commercial availability of navigation devices more than ten years ago as part of the Telecommunications Act of 1996.[8] The Commission implemented this directive in 1998 through the adoption of the "integration ban," which established a date after which cable operators no longer may place into service new navigation devices (*e.g.*, set-top boxes) that perform both conditional access and other functions in a single integrated device.[9] Originally, the Commission established January 1, 2005 as the deadline for compliance with the integration ban.[10] On two occasions, the National Cable and Telecommunications Association ("NCTA"), on behalf of all cable operators, sought – and obtained – extensions of that deadline.[11] The Commission ultimately fixed July 1, 2007 as the deadline in order to afford cable operators additional time to determine the feasibility of developing a downloadable security function that would permit compliance with the Commission's rules without incurring the cable operator and consumer costs associated with the separation of hardware.[12] NCTA filed another request to extend the July 1, 2007 deadline,[13] which the Media Bureau denied on June 29, 2007.[14]

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[7] See 47 C.F.R. §§ 1.3, 76.7; *Order* at ¶¶ 15-33. The Bureau also "grant[ed] Comcast leave to amend its request" for waiver. *Id.* at ¶ 1. *See also id.* at ¶¶ 32-34.

[8] *See* Section 629(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 549(a) (requiring the FCC "to adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor") *See also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56, 125-126 (1996).

[9] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14803, ¶ 69 (1998) ("*First Report and Order*") (adopting Section 76.1204 of the Commission's rules, subsection (a)(1) of which (1) required multichannel video programming distributors ("MVPDs") to make available by July 1, 2000 a security element separate from the basic navigation device (*i.e.*, the CableCARD), and, in its original form, (2) prohibited MVPDs covered by this subsection from "plac[ing] in service new navigation devices ... that perform both conditional access and other functions in a single integrated device" after January 1, 2005). *See also* 47 C.F.R. § 76.1204(a)(1) (1998).

[10] *First Report and Order*, 13 FCC Rcd at 14803, ¶ 69.

[11] In April 2003, the Commission extended the effective date of the integration ban until July 1, 2006. *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003) ("*Extension Order*"). Then, in 2005, the Commission further extended that date until July 1, 2007.[11] *See 2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

[12] *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

[13] *See* National Cable & Telecommunications Association's Request for Waiver of 47 C.F.R. § 76.1204(a)(1) at 1 (filed Aug. 16, 2006) ("*NCTA Request for Waiver*") (seeking a third extension of the deadline for compliance with the integration ban "for all cable operators until their deployment of downloadable security or December 31, 2009, whichever is earlier"); *National Cable & Telecommunications Association Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2920 (MB rel. June 29, 2007).

[14] *National Cable & Telecommunications Association Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2920 (MB rel. June 29, 2007).

3. The purpose of the integration ban is to assure reliance by both cable operators and consumer electronics manufacturers on a common separated security solution.[15] This "common reliance" is necessary to achieve the broader goal of Section 629 – *i.e.*, to allow consumers the option of purchasing navigation devices from sources other than their MVPD.[16] Although the cable industry has twice challenged the lawfulness of the integration ban, in both cases the D.C. Circuit denied those petitions.[17] In limited circumstances, however, operators may be eligible for waiver of the integration ban.[18]

4. Until and unless MVPDs subject to the integration ban[19] actually begin relying upon the same separated security solution made available to consumer electronics manufacturers – whether that is a hardware-based solution (*i.e.*, CableCARDs) or a software-based solution[20] – the objective of Section 629

[15] *See Order* at ¶ 30, n.105. *See also Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-48, at ¶ 19 (MB rel. Jan 10, 2007) (citing the *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 30) (explaining why the Commission "require[d] MVPDs and consumer electronics manufacturers to rely upon identical separated security with regard to hardware-based conditional access solutions").

[16] *See* S. REP. 104-230, at 181 (1996) (Conf. Rep.). *See also Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004). As the Bureau noted, Congress characterized the transition to competition in navigation devices as an important goal, stating that "[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality." *Order* at ¶ 2 (citing H.R. REP. NO. 104-204, at 112 (1995)).

[17] *Charter Comm., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000). The Commission argued, and the D.C. Circuit agreed, that the integration ban was a reasonable means to meet Section 629's directive. *Charter Comm., Inc. v. FCC*, 460 F.3d 31, 41 (D.C. Cir. 2006) ("this court is bound to defer to the FCC's predictive judgment that, '[a]bsent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation.'").

[18] For example, Section 629(c) provides that the Commission shall grant a waiver of its regulations implementing Section 629(a) upon an appropriate showing that such waiver is necessary to assist the development or introduction of new or improved services. 47 U.S.C § 549(c). In the *2005 Deferral Order*, the Commission announced that it would entertain requests for waiver for low-cost, limited-capability devices. *See 2005 Deferral Order*, 20 FCC Rcd 6794, 6813-14, ¶ 37. More recently, petitioners who have shown good cause have received waivers of the integration ban pursuant to Sections 1.3 and 76.7 of the Commission's rules. *See Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-47 (MB rel. Jan 10, 2007); *Cablevision Systems Corporation's Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-48, at ¶ 19 (MB rel. Jan 10, 2007).

[19] *See* 47 C.F.R. § 76.1204(a)(2) (stating that the requirements set forth in subsection (a)(1) "shall not apply to a multichannel video programming distributor that supports the active use by subscribers of navigation devices that: (i) operate throughout the continental United States, and (ii) are available from retail outlets and other vendors throughout the United States that are not affiliated with the owner or operator of the multichannel video programming system"). *See also First Report and Order*, 13 FCC Rcd at 14801, ¶ 65-66 (concluding that DBS providers and "direct to home (DTH or larger satellite service dish providers)" satisfy the exemption, set forth in Section 76.1204(a)(2) of the Commission's rules, from the separated security requirements set forth in Section 76.1204(a)(1)).

[20] *See 2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31 (recognizing "that development of set-top boxes and other devices utilizing downloadable security is likely to facilitate the development of a competitive navigation device market . . . [and] aid in the interoperability of a variety of digital devices"). *See also Commission Reiterates that Downloadable Security Technology Satisfies the Commission's Rules on Set-Top Boxes and Notes Beyond Broadband Technology's Development of Downloadable Security Solution*, DA 07-51, at ¶ 1 (MB rel. Jan 10, 2007) (Public Notice) (noting that "Beyond Broadband Technology, LLC (BBT) has already developed a downloadable security solution which provides for common reliance").

will not be achieved. Given the extensions of the integration ban deadline that already have been granted, we believe that any additional requests for waivers of that deadline, including the one before us, appropriately have a heavy burden to overcome.[21]

III. COMMENTS

5. Several parties filed comments regarding Comcast's Application for Review.[22] Two manufacturers of the Subject Boxes argue that incorporating CableCARD functionality into the Subject Boxes will increase their cost and effectively deprive consumers of a low-cost option for accessing digital services.[23] They assert that the higher cost will lower consumer demand, thereby slowing the cable industry's transition to all-digital systems and delaying the benefits associated with that transition.[24] According to certain manufacturers, there is no market interest for cable-operator-provided, one-way (*i.e.*, non-interactive) set-top boxes, and therefore the Commission could not have intended to limit the waivers contemplated in the *2005 Deferral Order* to such devices.[25] Other commenters suggest that denial of Comcast's Application for Review will impose additional costs on subscribers and present a hurdle as subscribers transition from analog to digital television.[26] Panasonic argues that grant of a waiver would ease the transition to all-digital terrestrial broadcasting[27] because devices that perform digital-to-analog conversion would allow current analog-only cable subscribers to continue to receive digital signals from broadcasters after the transition.[28] Panasonic also urges us to consider "Comcast's expectation and

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[21] *See Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) (applicant bears heavy burden to demonstrate that his arguments for waiver are substantially different from those that have been carefully considered in rulemaking proceeding). *See also* Sony Comments at 2 ("Only a narrowly tailored, well-justified waiver request that fits in the context of the Act and Commission precedent could reasonably have been granted.").

[22] *See, e.g.*, comments filed by Americans for Prosperity, Cisco Systems, Inc. ("Cisco"), the Consumer Electronics Association ("CEA"), the Hispanic Federation, the League of Rural Voters, Motorola, Inc. ("Motorola"), the National Black Chamber of Commerce, Pace Micro Technology, PLC ("Pace Micro"), Panasonic Corporation of North America ("Panasonic"), Pioneer North America, Inc., Sony Electronics, Inc. ("Sony"), and the U.S. Hispanic Chamber of Commerce. Comcast, NCTA, and Thomson filed reply comments.

[23] Cisco Comments at 1-2, Motorola Comments at 3. Cisco is the parent company of Scientific Atlanta, manufacturer the Explorer-940, one of the Subject Boxes. Motorola manufactures the DCT-700, another one of the Subject Boxes. Pace Micro manufactures the third Subject Box, the Pace Chicago.

[24] Cisco Comments at 2, Motorola Comments at 3.

[25] Motorola Comments at 4, Pace Micro Comments at 3-4. In a similar vein, NCTA argues that the Commission's reference to Comcast's Waiver Request in arguments before the D.C. Circuit implied that the Commission would grant waiver for two-way devices. *See* NCTA Reply at 3-4.

[26] *See, e.g.*, Letter from Niel Ritchie, Executive Director, League of Rural Voters, to Kevin Martin, Chairman, Federal Communications Commission (Feb. 13, 2007), Letter from Lillian Rodriguez-Lopez, President, Hispanic Federation, to Kevin Martin, Chairman, Federal Communications Commission at 1 (Feb. 14, 2007); Letter from Tim Phillips, President, Americans for Prosperity, to Kevin Martin, Chairman, Federal Communications Commission, et al. at 1 (Feb. 13, 2007), Letter from Michael L. Barrera, President and CEO, U.S. Hispanic Chamber of Commerce, to Kevin J. Martin, Chairman, Federal Communications Commission (Feb. 14, 2007); Letter from Harry C. Alford, President/CEO, National Black Chamber of Commerce, to the Chairman and Commissioners of the Federal Communications Commission at 1-2 (Feb. 22, 2007); NCTA Reply at 2; Comcast Reply at 1-2.

[27] In 2006, Congress set February 17, 2009 as the statutory deadline by which all terrestrial television broadcasters must cease broadcasting analog signals. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (amending Section 309(j) (14) and Section 337(e) of the Communications Act, as amended).

[28] Panasonic Comments at 3-5 (noting that "to the extent that limited-capability digital cable set-top boxes which convert digital cable signals to analog signals for display on existing, conventional NTSC televisions, can contribute

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support for the resources and actions necessary to assure its network is rapidly [OpenCable Applications Platform ("OCAP")] capable," arguing that OCAP is necessary to achieve a competitive navigation device market.[29]

6. Parties urging the Commission to deny Comcast's Waiver Request emphasize that the Bureau properly denied the Waiver Request as overly broad and acted consistent with Commission precedent and case law.[30] They counter that the Commission repeatedly has considered the issue of short-term costs and note that the Commission in 2005 specifically developed a narrow exception to the integration ban to make certain that subscribers do not face hurdles in the transition to all-digital systems.[31] CEA, which represents 2,100 companies within the U.S. consumer technology industry,[32] adds that enforcement of the integration ban for all of the set-top boxes deployed by Comcast and other multiple system operators is the only way to ensure that economies of scale are achieved with respect to the production costs of CableCARDs.[33] Sony disputes Comcast's claim that it should not have to divert resources from OCAP and a downloadable security solution, noting that the Commission has previously considered and rejected that argument.[34] Sony also emphasizes that "cable operators have been on notice with respect to the common reliance requirement for nearly nine years."[35]

IV. DISCUSSION

7. Comcast argues that the Bureau ignored the Commission's policy with regard to waivers for low-cost, limited-capability set-top boxes, misapplied the waiver standards in Section 629(c) of the Communications Act and Sections 1.3 and 76.7 of the Commission's rules, and attempted to establish new policy as part of the waiver process.[36] As discussed below, we conclude that the Bureau correctly applied the statute and the Commission's rules. A waiver under Section 629(c) is not warranted here because Comcast has failed to show that a waiver is necessary to assist the development or introduction of new technologies or services.[37] In addition, we find that Comcast's request does not meet the requirements for waiver under the policy announced in the *2005 Deferral Order* because the subject set-top boxes contain an advanced capability, *i.e.,* two-way functionality, and thus are not the "low-cost,

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to expanding quickly and readily the number of America's 'digital TV' households, the sooner the benefits of the digital broadcast transition can accrue to both consumers and local broadcast stations").

[29] Panasonic Comments at 7. *See also* Thomson Reply at 3 (referring to the cable industry's successful implementation of DOCSIS, and arguing that imposition of the integration ban will divert resources from a similarly successful adoption of OCAP).

[30] *See, e.g.,* Sony Comments at 3-13; CEA Comments at 10-11. Furthermore, Sony contends that Comcast did not meet any standard for waiver. *See* Sony Comments at 13-19.

[31] Sony Comments at 9-10.

[32] About CEA, http://www.ce.org/AboutCEA/default.asp (last visited March 6, 2007).

[33] CEA Comments at 4-5 (arguing that "mass production and use throughout the converter box lineup by Comcast and other MSOs is the *only* way finally to make Moore's law effective for CableCARDs," upon which "competitive future two-way devices" will depend).

[34] Sony Comments at 8.

[35] Sony Comments at 8, n.27.

[36] *See generally* Application for Review at i-ii.

[37] *Order* at ¶¶ 17-19.

limited capability" set-top boxes covered under the policy .[38] Further, Comcast has failed to demonstrate that any public interest benefits of a waiver would outweigh the associated harms, and thus a waiver is not warranted under either Sections 1.3 or 76.7 of the Commission's rules. Accordingly, we deny Comcast's Application for Review.

A. Section 629(c)

8. Pursuant to Section 629(c), the Commission shall grant a waiver of its navigation device rules when "necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products."[39] Comcast asserts that Section 629 requires the Bureau to consider "Comcast's ability to expand and enhance digital services" when evaluating Comcast's request for waiver.[40] While Comcast admits that it has had success in its digital deployment, it nevertheless claims that waiver is necessary for continued development and consumer adoption of that service,[41] and argues that the Bureau ignored the need to transition analog subscribers to entry-level digital service.[42] Comcast also contends that the Bureau erred in four other respects in its application of Section 629(c): (1) ignoring Comcast's offer to make its waiver request for a limited time; (2) barring operators from filing requests for low-cost, limited-capability devices under Section 629(c); (3) suggesting that waivers granted pursuant to Section 629(c) are solely for new entrants; and (4) failing to comply with the 90-day timeframe set forth in Section 629(c).[43]

9. We reject Comcast's interpretation of Section 629(c). Section 629(c) directs the Commission to grant waiver of its rules upon an appropriate showing that such waiver is "necessary to assist the development or introduction of a new or improved . . . service."[44] We find that the Bureau properly interpreted this language. To interpret Section 629(c) as requiring a waiver based on "Comcast's ability to expand and enhance digital services," as Comcast argues, not only would improperly expand the scope of the statutory waiver standard, but effectively would eviscerate the very purpose of the integration ban: implementation of Congress' directive that the Commission adopt rules to assure a competitive navigation device market develops.[45] As the Bureau indicated, "while it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a lenient manner. Indeed, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a)."[46] We agree with the Bureau's analysis. Grant of broad waiver requests (like the instant waiver request for the Subject Boxes) would lead to deployment of a substantial number of integrated devices.[47] This, in turn, would decrease operators' incentives to support fully CableCARD

[38] *See Order* at ¶ 26, 29-30.

[39] Application for Review at 10-13.

[40] Application for Review at 12 (emphasis omitted).

[41] Application for Review at 11-13.

[42] Application for Review at 12-13.

[43] Application for Review at 13-15.

[44] 47 U.S.C. § 549(c).

[45] 47 U.S.C. § 549(a).

[46] *See Order* at ¶ 19.

[47] Indeed, in its initial Waiver Request, Comcast stated that it "aims to purchase between 1 million and 1.5 million DCT-700s" in 2006 and "expects to purchase comparable numbers of these devices (whether the DCT-700,

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devices that are connected to their cable systems – and as CEA asserts, the success of third-party devices depends on adequate operator support.[48] Further, we conclude that the failure to date of the parties to negotiate successfully an agreement that would enable the development and sale of two-way, interactive navigation devices at retail compels us to strictly enforce the Commission's rules, including the integration ban, that are designed to implement Section 629(a).

10. While Comcast may be correct in its assertion that the existence of some digital services does not preclude the Commission from considering a waiver application under Section 629(c),[49] we find compelling that as of February 2006, all Comcast subscribers live in markets where Comcast has launched digital service.[50] Therefore, Comcast has significantly more than "some" existing digital services, and based on these facts has failed to show that a waiver is "necessary" here to assist in the "development or introduction" of new or improved services. Moreover, we fully expect Comcast to continue to develop and introduce digital services in a rapid manner in the absence of a waiver and thus do not believe that a waiver is "necessary" to assist in the development or introduction of such services.[51] Moreover, we reject Comcast's assertion that waiver is warranted in this case because the cost of its entry-level digital service will increase without waiver, thereby discouraging adoption of digital service.[52] As the Commission has explained previously, the integration ban strikes a proper balance between that potential harm and achievement of Section 629's goal of a competitive navigation device marketplace,[53] and that ban has been upheld by the D.C. Circuit.[54] Therefore, we conclude that the Bureau was correct in finding that Comcast failed to make the appropriate showing that a waiver was necessary, as required by Section 629(c).

11. As the Bureau correctly found that Comcast has not justified a waiver under Section 629(c), it is not necessary for us to address Comcast's other assertions with respect to Section 629(c). In order to provide further guidance to interested parties, however, we will address these concerns. First, we agree

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Explorer-940, or Pace Chicago set-top boxes) in subsequent years if the instant waiver is granted." Waiver Request at 10. *See also* Microsoft Comments at 5 (filed June 15, 2006) (stating that Comcast will deploy the limited-capability set-top boxes in 20 percent of its customers' homes by the end of 2006).

[48] *See* CEA Comments at 4-5.

[49] Application for Review at 11.

[50] *Order* at ¶ 17.

[51] *See, e.g., Order* at ¶ 18 (noting that Comcast's revenues from VOD and PPV increased 30 percent between the second quarter of 2005 and the second quarter of 2006) (citation omitted); Press Release, Comcast Corporation, Comcast Holds 2007 Annual Meeting of Shareholders (May 23, 2007) *available at* http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=1006266&highlight= (recounting Comcast Chairman and CEO Brian Roberts' comments "about Comcast's superior cable, Internet, and phone products" and his expectation that those products will "continue to drive significant growth for the Company during the remainder of 2007 and beyond. In particular, he said he expects Comcast Digital Voice penetration to be 20-25% by the end of 2009.").

[52] Application for Review at 12-13.

[53] *See 2005 Deferral Order*, 20 FCC Rcd at 6807, ¶ 27 ("[A]lthough we wish to place as little of the cost burden resulting from the ban on the public, the mere fact that consumers will bear some of the costs resulting from the imposition of the integration ban is not sufficient justification to eliminate the ban.").

[54] *See Charter Comm., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C.Cir. 2000). *See also* CEA Comments at 8 ("The requirement of 'necessity' means that Comcast must show more than simply that compliance with the rule will impose a nonzero cost on Comcast.").

with the Bureau that Comcast's original Waiver Request, which was unlimited in duration, was overly broad, and that waivers under Section 629(c) must be requested for a limited time.[55] Second, we clarify the Bureau's statement that "future requests for waiver for low-cost, limited capability set top boxes will not be considered under Section 629(c), but rather under the standard developed in the *2005 Deferral Order*."[56] While cable operators are not barred from filing waiver requests for low-cost, limited-capability set top boxes pursuant to Section 629(c), we believe generally that waivers sought for such devices are more appropriately requested under the waiver policy articulated in the *2005 Deferral Order*. Specifically, the purpose of Section 629(c) is to provide waivers where "necessary to assist the development or introduction of a new or improved ... service," whereas the waiver policy established in the *2005 Deferral Order* is directed at devices that provide solely the ability to view digital cable signals on analog television displays. Thus, we cannot envision a device that would satisfy our *2005 Deferral Order's* waiver policy and at the same time meet the waiver standards of Section 629(c).[57] Third, Comcast incorrectly claims that the Bureau suggested that waivers granted pursuant to Section 629(c) are solely for new competitors. The Bureau offered this as an example, not as a prerequisite for waiver under Section 629(c).[58] Finally, we clarify the Bureau's statement that "requests for waiver made pursuant to the *2005 Deferral Order* are not subject to the 90-day time limit set forth in Section 629(c)."[59] As discussed above, we believe that waivers for low-cost, limited-capability set top boxes are more appropriately evaluated under the waiver policy articulated in the *2005 Deferral Order* rather than under Section 629(c). Thus, to the extent a waiver request for a low-cost, limited-capability set-top box does not meet the standard of Section 629(c), it will be evaluated under the Commission's general waiver standard, to which the 90-day time limit in Section 629(c) does not apply.[60]

B. *2005 Deferral Order*

12. Comcast asserts that the Bureau misinterpreted and ignored the Commission's policy with respect to "low-cost, limited capability" set-top boxes,[61] contending that such devices were exempted "to

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[55] *See* 47 U.S.C. § 549(c) (directing the Commission to waive regulations adopted under subsection (a) "for a limited time"). Although, as Comcast notes, it did later propose that the Commission could make a more limited five year grant, *see* Letter from Brian L. Roberts, Chairman and Chief Executive Officer, Comcast Corporation, to Kevin J. Martin, Chairman, Federal Communications Commission at 2 (Aug. 21, 2006), the Bureau correctly determined that Comcast's waiver request failed to meet the standard under Section 629(c) regardless of the timeframe for which waiver was sought because Comcast did not show that waiver was "necessary" to assist in the development or introduction of new or improved services. *See Order* at ¶¶ 17-19. Accordingly, we conclude that the Bureau's failure to note that subsequent amendment of the waiver request constitutes harmless error. *See Order* ¶ 20.

[56] *See Order* at ¶ 24, n.92. *See also* Application for Review at 13-14.

[57] *See Order* at ¶ 24, n.92.

[58] *See Order* at ¶ 15 ("[W]aivers of those regulations are granted when doing so 'is necessary to assist the development or introduction of a new or improved' service, such as, *for example*, a nascent MVPD offering from a new competitor.") (emphasis added).

[59] *See Order* at ¶ 24, n.92.

[60] Comcast argues that the legislative history directs the Commission to "act on" waiver requests within 90 days. *See* Comcast Reply at 4, n. 16 (citing S. REP. 104-230, at 181 (1996) (Conf. Rep.)). Yet Section 629(c) expressly limits the 90-day requirement to waiver requests making "an appropriate showing" that such waiver is necessary. Our determination that Comcast's request did not satisfy the substantive requirements of Section 629(c) therefore means that the 90-day procedural requirement does not apply.

[61] Application for Review at 2-10.

expand consumer access to digital services via existing analog television sets."[62] Comcast also argues that the Commission relied on the availability of the low-cost, limited-capability waiver to support the integration ban in its brief and in oral arguments before the D.C. Circuit in *Charter Communications v. FCC*.[63] Comcast contends further that the Bureau misinterpreted the Commission's intent by finding that two-way functionality exceeds the "limited capability" standard.[64] Comcast claims that it has never deployed one-way digital set-top boxes, and the Commission could not have intended in the *2005 Deferral Order* to exempt devices that do not exist.[65]

13. We conclude that the Bureau correctly applied Commission policy – specifically, the waiver standard for low-cost, limited-capability devices the Commission established in 2005 – to Comcast's request for relief.[66] The Commission stated in the *2005 Deferral Order* that it would consider waiver requests for "low-cost, limited capability" set-top boxes to ensure that no consumer loses the ability to receive digital programming as broadcasters and cable providers transition to digital.[67] The Commission did not commit to automatically grant every waiver requested that purports to satisfy that objective. Rather, the Commission said that it would entertain such requests for waiver where the subject device met specific criteria and in the context of facilitating the digital transition.[68] Accordingly, we believe that the Commission's stated intention to "not displace a low-cost set-top box option for MVPD subscribers"[69] appropriately must be considered within that narrowly defined context, while keeping in mind the overarching goal of establishing a competitive market for navigation devices.

14. Further, as noted above, in preserving a low-cost option in 2005, the Commission intended to protect consumers by narrowly tailoring the waiver standard to address a specific governmental interest – enabling analog cable subscribers to continue to view programming as cable operators and broadcasters transition to all-digital transmissions.[70] Indeed, filings from the cable industry in late 2004 indicate that the industry's main concern was that existing analog devices would require simple "digital-to-analog converters" as cable providers transitioned to all-digital systems, and that requiring those devices to include a CableCARD interface would "present a serious impediment to the discontinuance of analog

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[62] Application for Review at 4 (emphasis in original).

[63] Application for Review at 2 (citing Brief of Respondents at 14, 30, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006) (No. 05-1237); Transcript of Oral Argument at 21, *Charter Comm. Inc. and Advance/Newhouse Comm. v. FCC* (D.C. Cir. 2006) (No. 05-1237); *2005 Deferral Order*, 20 FCC Rcd at 6807-6809, 6813-6814, ¶¶ 27, 29, 37). *See also* Comcast Reply at 2, NCTA Reply at 3-5.

[64] Application for Review at 6-10.

[65] Application for Review at 6-7.

[66] The waiver policy articulated in the *2005 Deferral Order* is a narrow application of the Commission's general waiver authority. *See, e.g.*, 47 U.S.C. § 154(i); 47 C.F.R. §§ 1.3, 76.7; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[67] *See 2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

[68] *2005 Deferral Order*, 20 FCC Rcd at 6813-14, ¶ 37.

[69] *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

[70] Previously, 47 U.S.C. § 309(j)(14) provided an exception to the original December 31, 2006 transition deadline if the Commission determined that less than 85 percent of the television households in a licensee's market were capable of receiving the signals of DTV broadcast stations through various means (*i.e.*, via over-the-reception, cable or satellite, or digital-to-analog conversion technology). 47 U.S.C. § 309(j)(14)(B)(iii) (2005). *See also* Sony Comments at 10, n.31 (arguing that because Congress replaced the "soft" deadline with a hard deadline, the policy basis for this waiver no longer exists).

transmission."[71] Comcast, however, misconstrues the term "limited capability boxes" to mean boxes providing the capabilities that the vast majority of its subscribers may want (as opposed to boxes with capabilities that are requested by only its "best customers," such as DVR capabilities, dual tuners, HD outputs, and broadband support, which Comcast does not consider to be "limited capability" boxes).[72] But while the Subject Boxes appear to be low-cost,[73] they include electronic programming guide ("EPG"), pay-per-view, video-on-demand ("VOD"), and switched-digital capabilities, all of which involve two-way communications between the set-top box and the cable headend and are not necessary to achieve the goal of enabling analog customers to continue to view programming as cable operators and broadcasters transition to digital.[74] Indeed, the Commission expressly warned in the *2005 Deferral Order* that we did not "believe that waiver [would] be warranted for devices containing personal video recording ("PVR"), high-definition, broadband Internet access, multiple tuner, or *other similar advanced capabilities*."[75] Thus, we do not believe that the Subject Boxes are appropriately characterized as "limited-capability" boxes. Accordingly, we affirm the Bureau's determination that set-top boxes containing such an

[71] Letter from Neal M. Goldberg, General Counsel, National Cable and Telecommunications Association, to W. Kenneth Ferree, Chief, Media Bureau, Federal Communications Commission at 7-8 (Dec. 20, 2004). *See also* Letter from Neal M. Goldberg, General Counsel, National Cable and Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, Attachment at 4 (Nov. 23, 2004) (explaining the need for an inexpensive "$35-$50" digital set-top box that will "permit the viewing of digital programming on analog TV sets").

[72] Application for Review at 18. *See also* Microsoft Corporation Comments at 5 (filed June 15, 2006) (estimating that the Subject Boxes would be in 20 percent of Comcast's digital subscribers' homes by the end of 2006). Furthermore, we conclude that Comcast's argument that its boxes have always had two-way capabilities is a bit disingenuous. Cable operators (particularly large cable operators, such as Comcast) dictate the types of set-top boxes that are produced, as they constitute the vast majority of the market for such devices. Accordingly, it appears the reason that one-way boxes do not exist is that cable operators have never asked device manufacturers to build such devices. *See Order* at ¶ 26, n.97 (noting that Pace Micro's "Digital Cable Adapter" was never produced due to a lack of interest from cable operators (citing Jeff Baumgartner, *New MSO-backed JV Proposes Sub-$100 Set-Top with Downloadable Security*, CED BROADBAND DIRECT, Dec. 22, 2003, *available at* http://www.cedmagazine.com/toc-bbdirect/2006/20061222.html)). Therefore, it appears to us that Comcast's problem is not that "low-cost, limited capability" devices do not exist, but rather that Comcast and other cable providers have not asked their device manufacturers to build them. *See* Application for Review at 4 (stating that "Comcast has *no interest* in ordering one-way set-top boxes") (emphasis added); Pace Micro Comments at 3 (noting that the cable operator market expressed no interest in a one-way set-top box); Cisco Comments at 2 (stating that the Subject Boxes "are the lowest cost, most limited capability digital cable boxes that are *currently* being commercially offered") (emphasis added); Motorola Comments at 4.

[73] *See* Application for Review at 3 (arguing that "[t]he boxes are low-cost (they cost between $70 and $100 at volume)"). *See* Sony Comments at 17 ("As [Sony] observed in its comments, and which [Comcast] does not rebut, grant of the Waiver Request would decrease today's CableCARD market base by an estimated thirty to forty percent, resulting in the concurrent loss of volume production benefits to consumers. Accordingly, the Bureau was correct to conclude that a grant would 'nullify the goal of Section 629(a).'") (citations omitted).

[74] We note that devices with the capabilities contained in the subject boxes are ineligible for the Coupon Program being administered by NTIA to assist Americans in receiving over-the-air broadcast television programming when full-power television stations cease analog broadcasting after February 17, 2009. To qualify for the Coupon Program, the Act requires that a box must be "a stand-alone device that does not contain features or functions except those necessary to enable a consumer to convert any channel broadcast in the digital television service into a format that the consumer can display on television receivers designed to receive and display signals only in the analog television service, but may also include a remote control device." *See* Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 21 (Feb. 8, 2006) (the Act), § 3005(d); *see also* 47 U.S.C. § 301.

[75] *See 2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37 (emphasis added).

advanced capability, *i.e.*, two-way functionality, should not be granted a waiver under the standard established in the *2005 Deferral Order*.[76]

15. We also find that the Bureau did not err in basing its interpretation of "advanced" capabilities on that term's meaning in the plug-and-play context.[77] The Commission's plug-and-play rules are inherently related to the navigation device rules; both sets of rules were adopted pursuant to the Commission's authority under Section 629, and the plug-and-play rules were adopted to allow third-party manufacturers to offer one-way (*i.e.*, non-interactive) digital-cable-ready navigation devices for sale at retail. Therefore, the filings in the plug-and-play docket serve as an appropriate source for guidance in this case. Furthermore, the Bureau took its references from cable industry filings.[78] In particular, we find it noteworthy that the cable industry specifically advocated before the Commission that the two-way interactive features contained in the Subject Boxes be classified as "advanced" capabilities. Specifically, the cable industry recommended that the Commission include in its regulations a requirement that non-interactive consumer electronics equipment contain a warning that "Certain *advanced* and interactive digital cable services such as video-on-demand, a cable operator's enhanced program guide and data-enhanced television services may require the use of a set-top box."[79] While cable operators are, of course, free to change their positions on issues to suit their evolving private economic interests, the Commission is not obliged to ignore such an evolution or to follow suit. Therefore, we disagree with Comcast's assertion that the definition of "advanced" used in the plug-and-play context is not relevant to this proceeding. Rather, we agree with the Bureau that it provides support for the conclusion that the Subject Boxes contain "advanced capabilities" and thus are not eligible for a waiver under the standard established in the *2005 Deferral Order*.[80]

C. The Bureau's Application of the Public Interest Waiver Standard

16. Comcast asserts that the Bureau misapplied the public interest waiver standard found in Sections 1.3 and 76.7 of the Commission's rules.[81] Comcast argues that the Bureau ignored the public

[76] Because we agree with the Bureau that electronic program guides, pay-per-view, and video-on-demand are advanced capabilities, we do not find it necessary to address Comcast's argument that the Bureau improperly relied on certain boxes' "potential networking capability" in finding the Subject Boxes ineligible for a waiver under the standard established by the *2005 Deferral Order*. *See* Application for Review at 9-10. With respect to waivers for truly "limited capability integrated digital cable boxes," however, we note favorably that the Bureau emphasized that it would "entertain and grant future requests that satisfy the criteria set forth in the *2005 Deferral Order*." *Order* at ¶ 30 (citation omitted).

[77] *See Order* at ¶¶ 27-28.

[78] *See Order* at ¶¶ 27-28, nn.101-102.

[79] NCTA Reply Comments, CS Docket No. 97-80, PP Docket No. 00-67 at Appendix 1, page 7 (filed April 28, 2003) (emphasis added). *See also* NCTA Comments, CS Docket No. 97-80, PP Docket No. 00-67 at 5-6 (filed March 28, 2003); *NCTA Request for Waiver* at 14 (describing VOD and EPGs as "advanced services").

[80] *See 2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

[81] Application for Review at 15-18. Section 1.3 of the Commission's rules states that "[t]he provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. Section 76.7(i) states that "[t]he Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute, issue an order to show cause, or initiate a forfeiture proceeding." 47 C.F.R. § 76.7(i).

interest benefits that it speculates would result if waiver were granted, namely increased consumer adoption of digital service, a smoother digital transition for Comcast and broadcasters, and accelerated development of a downloadable security solution.[82] Comcast also contends that the Bureau afforded too much weight to the potential harms that consumer electronics manufacturers face.[83]

17. The Bureau properly weighed the potential public interest benefits of waiver against the potential harms in its review of the Waiver Request. As mentioned above, the Commission has already addressed this issue by analyzing the harms and benefits associated with the integration ban, and concluded that the benefits justified any potential harms, including the potential increased cost of set-top boxes:

> [T]he costs that this requirement will impose should be counterbalanced to a significant extent by the benefits likely to flow from a more competitive and open supply market. In particular, it seems likely that the potential savings to consumers from greater choice among navigation devices will offset some of the costs from separating the security and non-security functions of either MVPD-supplied devices or those that might otherwise be made available through retail outlets. In addition, except as discussed below, we generally do not believe that maintenance of the prohibition on integrated navigation devices will delay the DTV transition. We believe that the incentive provided by the separate security requirement will spur cable operators to meet their obligations and promote the timely development of a competitive market in host devices. Accordingly, we find that there are sufficient competitive and consumer benefits to justify the costs of the ban.[84]

As noted above, the paramount goal of the integration ban is a competitive navigation device market, and we conclude that the Bureau correctly weighed this objective heavily when evaluating the relative public interest benefits and harms associated with Comcast's request.[85] Likewise, the Bureau recognized the Commission's decision that common reliance on a separated security function was the best means to meet that goal.[86] If the Bureau had granted the Waiver Request, it would have created an exception to the

[82] Application for Review at 15-16.

[83] Application for Review at 16-18.

[84] *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29. *See also Charter Communications, Inc. v. FCC*, 460 F.3d 31, 42 (D.C. Cir. 2006) (quoting *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29 (noting that "Congress regarded the commercial availability of navigation devices from independent sources as a benefit in and of itself"); Delta Radio, Inc. v. FCC, 387 F.3d 897, 901(D.C. Cir. 2004) (holding that although an agency must give a waiver request a hard look to ensure that the agency is not rigidly applying a rule where it is not in the public interest, strict application of a rule may be justified by the gain in certainty and administrative ease, even if it results in some hardship). *See also* Sony Comments at 8 ("Petitioner's argument that the Bureau Decision did not explicitly acknowledge the costs of compliance must fail, because the question of whether such costs could justify an exception to the rule had been asked and answered in the negative on multiple occasions.").

[85] *See Order* at ¶ 31, n.109.

[86] *See Order* at ¶ 31. In the *2005 Deferral Order*, the Commission explained the justification for common reliance:

> We believe that common reliance by MVPDs and consumer electronic manufacturers on an identical security function will align MVPDs' incentives with those of other industry participants so that MVPDs will plan the development of their services and technical standards to incorporate devices that can be independently manufactured, sold, and improved upon. Moreover, if MVPDs must take steps to support their own compliant equipment, it seems far more likely that they will continue to support and take into account the need to support services that will work with

(continued....)

integration ban rule that would have substantially undermined the goals of common reliance, *e.g.*, developing a commercial market for navigation devices.[87] While we recognize concerns raised by some commenters that imposition of the integration ban may lead to higher cable bills in the short term,[88] we reaffirm the conclusion that the Commission reached in the *2005 Deferral Order* that "the costs that this requirement will impose should be counterbalanced to a significant extent by the benefits likely to flow from a more competitive and open supply market."[89] Therefore, we conclude that the Bureau correctly found that the possible public interest benefits suggested by Comcast in support of its Waiver Request do not outweigh the substantial public interest benefits associated with the integration ban and the possible harm that could result from granting Comcast's waiver request .

18. Comcast also contends that the Bureau improperly modified the standard for waiver established in the *2005 Deferral Order* for low-cost, limited-capability set-top boxes.[90] Specifically, Comcast alleges that "[t]he Bureau has now conjured up an entirely different waiver regime which is completely disconnected from the simple process established by the full Commission in 2005" and that "[u]nder the Bureau's newly-concocted test, if Comcast wants to deploy the DCT-700 and similar low-cost boxes after the ban, it must commit to going all-digital before February 2009 or to using the boxes solely for specialty tier customers."[91] Comcast contends that this constitutes the impermissible establishment of a new waiver standard by the Bureau that "conflict[s] with law and policy established by Congress and the Commission."[92]

(...continued from previous page)

> independently supplied and purchased equipment. We believe that cable operator reliance on the same security technology and conditional access interface that consumer electronics manufacturers must rely on is necessary to facilitate innovation in competitive navigation device products and should not substantially impair innovation in cable operator-supplied products . . . [T]he concept of common reliance is intended to assure that cable operator development and deployment of new products and services does not interfere with the functioning of consumer electronics equipment or the introduction of such equipment into the commercial market for navigation devices.

2005 Deferral Order, 20 FCC Rcd at 6809-6810, ¶ 30. *See also Charter Communications, Inc. v. FCC*, 460 F.3d 31, 40-41 (D.C. Cir. 2006).

[87] *See* Microsoft Corporation Comments at 5 (filed June 15, 2006) (estimating that the Subject Boxes would be in 20 percent of Comcast's digital subscribers' homes by the end of 2006).

[88] *See, e.g.*, Letter from Niel Ritchie, Executive Director, League of Rural Voters, to Kevin Martin, Chairman, Federal Communications Commission (Feb. 13, 2007), Letter from Lillian Rodriguez-Lopez, President, Hispanic Federation, to Kevin Martin, Chairman, Federal Communications Commission at 1 (Feb. 14, 2007); Letter from Tim Phillips, President, Americans for Prosperity, to Kevin Martin, Chairman, Federal Communications Commission, et al. at 1 (Feb. 13, 2007), Letter from Michael L. Barrera, President and CEO, U.S. Hispanic Chamber of Commerce, to Kevin J. Martin, Chairman, Federal Communications Commission (Feb. 14, 2007).

[89] *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 29.

[90] *See* Application for Review at 18, 19-22.

[91] Application for Review at 18.

[92] Application for Review at 18. *See also id.* at 19 (arguing that, in granting Comcast leave to file an amended waiver request for the Subject Boxes "based on a commitment to go all-digital by a date certain," the Bureau has created "an entirely new policy that does not derive from any previous Commission order"); *id.* at 22 (contending that the Bureau, by granting Comcast leave to file an amended waiver request for Subject Boxes deployed exclusively to family and ethnic tier customers, has established a new policy that "is unrelated to the waiver process established by the Commission in the [*2005 Deferral Order*] or the navigation device proceeding generally").

19. Although the Bureau denied Comcast's request for waiver, it granted Comcast leave to file an amended waiver request and suggested potential ways that Comcast might be able to demonstrate that a waiver is in the public interest. In particular, it stated that a waiver request demonstrating a commitment to go all-digital by a date certain or to provide specialty tiers without a tier-buy-through requirement might lead to a different result.[93] Comcast alleges that when the Bureau made these suggestions, the Bureau actually was revising the waiver standard the Commission established in 2005.[94] We disagree. This discussion took place in the context of the Bureau's consideration of Comcast's request for relief under the general waiver provisions of Sections 1.3 and 76.7 of the Commission's rules – *not* in the context of its evaluation of that request pursuant to the waiver policy the Commission established in 2005 for low-cost, limited-capability devices.[95]

20. Moreover, the Bureau merely provided examples of how certain public interest benefits already alleged by Comcast in its original waiver request,[96] if expressed in more definitive terms, might cause the Bureau to reassess the relative public interest harms and benefits that would result from a waiver of the integration ban for the Subject Boxes. For this reason, we conclude that the Bureau did not establish new policy or amend any policies that were established by the full Commission.[97] It was merely trying to provide helpful guidance. Further, we note that, going forward, Comcast may amend its request for waiver under Sections 1.3 and 76.7 on any basis it chooses. Comcast is not in any way limited to, or constrained by, the examples provided by the Bureau in the *Order*. Rather, the only burden that Comcast must overcome with any future request for waiver of the integration ban for the Subject Boxes under

[93] *See Order* at ¶ 32.

[94] *See, e.g.*, Application for Review at 19 (arguing that "[t]here is no rational basis upon which the Bureau can conclude that this language in the 2005 *Order* imposed a requirement to go all-digital on waiver applicants"); *id.* at 22 ("This specialty tier requirement, like the all-digital requirement, is unrelated to the waiver process established by the Commission in the [*2005 Deferral Order*] or the navigation device proceeding generally.").

[95] *See Order* at ¶ 32 (evaluating Comcast's request under the general waiver provisions of Sections 1.3 and 76.7 and noting that "specialty tiers such as family and ethnic tiers promote the public interest by allowing for more targeted programming, increasing the quality of available programming, and giving consumers greater control over the type of programming they see and the ability to limit the amount they spend on service") (citation omitted). *See also id.* at ¶ 34 (concluding that Comcast has failed to demonstrate that a waiver of the integration ban for the Subject Boxes is warranted under any relevant waiver standard but providing Comcast with the opportunity to file an amended request that either (1) "seeks waiver for a *truly low-cost, limited capability* set-top box" (*i.e.*, a set-top box that satisfies the waiver standard established in the *2005 Deferral Order*) (emphasis added); (2) "seeks a limited waiver for family and ethnic tier customers only" (*i.e.*, a waiver *for the Subject Boxes* – which are *not* limited-capability boxes – under Sections 1.3 and 76.7); or (3) "seeks waiver based on a commitment to go all-digital by a date certain such as February 2009 or sooner, when broadcasters will cease their analog operations" (again, a waiver for the Subject Boxes under Sections 1.3 and 76.7)); *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-47, at ¶ 27 (MB rel. Jan 10, 2007) (concluding that the DCT-700 – which is one of the Subject Boxes, and which, like the other Subject Boxes, includes two-way functionality – is not eligible for a waiver under the *2005 Deferral Order* "because it includes two-way functionality that places it outside of the scope of what the Commission intended when it was considering a waiver for 'limited capability integrated digital cable boxes,'" but conditionally granting BendBroadband a waiver for the DCT-700 under Sections 1.3 and 76.7 because the Bureau "recognize[d] that the ability to rapidly migrate to an all-digital network [by 2008] would produce clear, non-speculative public benefits").

[96] *See* Waiver Request at 10-11 (contending that "[a]pproval of the waiver will afford millions more Comcast customers access to a wide array of digital programming and services" including "special tiers of service"); *id.* at 13 (arguing that grant of the waiver request "will aid the migration of Comcast's cable systems to all-digital networks").

[97] *See* Sony Comments at 18-19.

Sections 1.3 and 76.7 is the requirement that it demonstrate that grant of such a request, on balance, would further the public interest.[98] Accordingly, it is not necessary for the Commission to decide whether the examples offered by the Bureau would be sufficient to tip the balance of the public interest analysis in favor of the applicant. Rather, because we agree with the Bureau's conclusion that the particular benefits actually asserted in Comcast's Waiver Request were insufficient, we hereby affirm the Bureau's decision not to grant the waiver.[99]

V. CONCLUSION

21. We affirm the Bureau's *Order* in this matter. Comcast's Waiver Request did not justify a waiver under Section 629(c), the waiver policy established in the *2005 Deferral Order*, or more generally under Sections 1.3 or 76.7 of the Commission's rules. The Bureau correctly found that waiver of the navigation device rules should be granted, for example, when necessary to assist in the development or introduction of new or improved services, when requested for a "low-cost, limited capability" device, or when it has been demonstrated that the public interest benefits of a waiver outweigh the substantial benefits that the establishment of a competitive navigation device market, facilitated by common reliance, would bring. As such, we deny Comcast's Application for Review.

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[98] *See* 47 C.F.R. § 76.7(i). As such, we do not find it necessary to address the various concerns raised by Comcast regarding the Bureau's suggestions. *See, e.g.*, Application for Review at 19-21 (arguing that Comcast cannot complete the migration to all-digital by February 2009); *id.* at 21-22 (arguing that Comcast – and cable operators generally – are not required by Congress to go all-digital by February 17, 2009, the deadline for the end of over-the-air analog broadcasts by full power television stations); *id.* at 22-25 (providing various reasons why Comcast does not intend to attempt to demonstrate voluntarily that a waiver of the integration ban under Sections 1.3 and 76.7 for Subject Boxes that are deployed exclusively to customers that subscribe to family and ethnic tiers would benefit the public interest).

[99] We note that Comcast recently submitted an *ex parte* letter in which it argued that denial of its waiver request would be inconsistent with previous staff decisions granting waivers to other companies. *See* Letter dated July 3, 2007 from Jonathan Friedman, Wilkie Farr & Gallagher, Counsel for Comcast Corp., to Marlene Dortch, Secretary, Federal Communications Commission (CS docket no. 97-80). "[I]t [is] not necessary for the FCC to address these nonbinding [staff] decisions" in this Commission-level order. *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990). They are not before us for review in this proceeding, and we accordingly express no opinion on the ultimate conclusions reached in those staff decisions. We do note, however, that each of the staff decisions about which Comcast complains involved a company that was not similarly situated to Comcast. For example, some companies receiving waivers from the staff committed to operate all-digital networks no later than February 17, 2009, other companies utilized technologies for which non-integrated HD or DVR devices have yet to be developed, and still others demonstrated unique financial hardship. *See, e.g., In the Matter of Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules,* Memorandum Opinion and Order, DA 07-2921 (MB rel. June 29, 2007); *In the Matter of Guam Cablevision, LLC,* Memorandum Opinion and Order, DA 07-2917 (MB rel. June 29, 2007); *In the Matter of Millenium Telecom, LLC D/B/A OneSource Communications,* Memorandum Opinion and Order, DA 07-2009 (MB rel May 4, 2007); *In the Matter of Charter Communications, Inc.*, Memorandum Opinion and Order, DA 07-2008 (MB rel. May 4, 2007) (waiver granted due to MVPD's demonstrated financial hardship); *see also* Letter from Monica Desai, Chief of Media Bureau, to Jonathan Friedman, Wilkie Farr & Gallagher, Counsel for Comcast Corp. In any event, as indicated above, all we decide here is that Comcast has not established *its* entitlement to a waiver; we do not address the adequacy of those waiver requests that are not before us. To the extent, however, that Comcast believes that it would be entitled to a waiver under the reasoning of a subsequently-issued Commission-level waiver grant, it is free to file another request.

VI. ORDERING CLAUSE

22. Accordingly, **IT IS ORDERED**, pursuant to Sections 1, 4(i), 5(c), and 629(c) of the Communications Act of 1934, as amended,[100] and 1.3, 1.115 and 76.7 of the Commission's rules,[101] that Comcast Corporation's Application for Review **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[100] 47 U.S.C. §§ 151, 154(i), 155(c), 405 and 549(c).

[101] 47 C.F.R. §§ 1.3, 1.115, 76.7.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices

Eleven years ago, Congress instructed the Commission to assure the commercial availability of set top boxes. The message was clear: American consumers should be able to purchase a device at Best Buy or Wal-Mart that works just as well with their television as the cable company's own device. This openness is clearly good news for cable subscribers. Vigorous competition will drive prices down and increase the pace of technological innovation.

Anyone who doubts the importance of replacing vertical integration with device openness need only look at the effects of the FCC's 1968 *Carterfone* decision, which freed consumers from the obligation to lease AT&T's black rotary phone. This reform unleashed a flood of less expensive phones and paved the way for innovations like the fax and answering machine. Indeed, it is no exaggeration to say that *Carterfone*—by enabling third-party manufacturers to develop and sell dial-up modems—played a critical role in bringing the Internet to American homes.

In a series of orders over the past decade, the FCC has affirmed that an integration ban is the right way to foster a robust market for third-party set top boxes. Yet for a variety of reasons, we have repeatedly postponed the effective date of the ban. The time for delay is over. I am delighted that Comcast consumers will soon be able to enjoy the benefits of a retail market for set top boxes. I am confident this will translate into lower prices and a better viewing experience for consumers.

Though I approve today's *Order*, I do want to address one procedural issue raised by our decision. The statute expressly requires the Commission to ***grant*** any waiver request made under Section 629(c) within 90 days. Because our decision ***denies*** such a request—and for good reason—the plain text of the statute does not require us to issue our decision within the 90-day statutory period. But even though our decision complies with the letter of the law, I do not think it is consistent with its spirit. I therefore note my view that a better practice would be to issue a grant ***or denial*** of a Section 629(c) waiver request within 90 days.

I thank the Bureau for their hard work on this item.

**JOINT STATEMENT OF
COMMISSIONERS ROBERT M. MCDOWELL
AND JONATHAN S. ADELSTEIN
CONCURRING**

Re: *Comcast Corporation Application for Review*, CS Docket No. 97-80

In this Order, the Commission upholds the Media Bureau's denial of Comcast's request for waiver of the integration ban. The primary reason for the denial is that the subject set-top boxes contain an advanced capability *i.e.*, two-way functionality, and thus are not the "low-cost, limited-capability" boxes that would qualify for a waiver under the Commission's *2005 Deferral Order*.

Before discussing the specifics of the application for review, it is important to survey how we arrived at this juncture. As part of the Telecommunications Act of 1996, Congress passed Section 629, directing the Commission to adopt regulations to "assure the commercial availability" to MVPD consumers of navigation devices, specifically "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."[1] Congress intended to create a competitive market for navigation devices by ensuring that consumers have the opportunity to buy navigation devices from sources other than their MVPD. In other words, Congress wanted to create a national, competitive market for navigation devices to give consumers the option of going to their electronics retailer to choose a set-top box with the features they want, rather than having only the boxes supplied from their MVPD.

To carry out the goals of Section 629, in 1998 the Commission adopted the "integration ban," which established a date after which cable operators no longer may place into service new set-top boxes that perform both conditional access and other functions in a single, integrated device. Specifically, the FCC required cable operators, not all MVPDs, to make available by July 1, 2000 a security element separate from the basic navigation device. Separating the security element from the host device (known as the "integration ban") would enable unaffiliated manufacturers, retailers and vendors to commercially market devices while allowing cable operators to retain control over their system security. Separated security allows individual cable operators to design and operate equipment reflecting their particular security needs, while still facilitating the development of a market for consumer equipment that is geographically portable. Technologically, this separation of security from other features could be achieved by equipping set-top boxes with "CableCARDs" supplied by the cable operator, which would access security functions. The Commission order allowed cable operators to use devices with integrated security until January 1, 2005.

The purpose of the ban was to assure reliance by both cable operators and consumer electronics manufacturers on a common separated security solution. This "common reliance" was intended to spur a competitive market in set-top boxes and thus provide consumers more choices and more innovative features offered by several vendors. The ban would thus help achieve the broader goal of Section 629 – allowing consumers to buy set-top boxes at retail, rather than only from their MVPD.

Both Congress and the Commission provided grounds for waiver of the regulations. Section 629(c) mandated that the Commission shall waive its regulations "for a limited time" upon a showing by

[1] 47 U.S.C. 549(a).

an MVPD provider or equipment provider that a waiver is "necessary to assist the development or introduction of a new or improved multichannel video programming or other service" offered over their systems. In its *2005 Deferral Order*, the Commission decided to consider requests for waiver of the integration ban for limited-capability integrated digital cable boxes to ensure that establishing a competitive market would not displace a low-cost set-top box option for MVPD subscribers.

The Commission originally fixed January 1, 2005 as the deadline for compliance with the integration ban. The cable industry sought and was granted two extensions of that deadline. In April 2003, the Commission extended the effective date until July 1, 2006 and then in 2005, further extended the date until July 1 of this year. The Commission granted the extensions on the basis that a downloadable security solution was feasible in the near term. All the relevant parties now agree that the industry is still years away from implementing downloadable security nationwide.

The cable industry has been on notice of this rule since 1998 and has already been granted extensions for two and a half years. The statute, in Section 629(c), contemplates waivers only for a limited period of time. In addition, Section 629(e) states that the Commission should sunset its rules only if a competitive market for navigation devices is established. Although the waiver standard in Section 629(c) may not apply because of the type of set-top boxes at issue, it is clear that Congress intended waivers to be temporary. Granting multiple extensions of the effective date essentially sunsets the rules before they take effect and before a competitive market emerges, contrary to Congress' explicit intent.

The statutory basis for waiver focused on the capabilities of the subject box to provide for new or improved services. Similarly, when the Commission established grounds for waiver of the integration ban in 2005, it made clear that we would look at the capabilities of the box. As we stated in the *2005 Deferral Order*:

> [W]e will entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes. We do not believe that waiver will be warranted for devices that contain personal video recording ("PVR"), high-definition, broadband Internet access, multiple tuner, or other similar advanced capabilities.

What we have done instead, through a series of Bureau-issued orders, is focus on ***the operator*** who requested the waiver, rather than ***the box***. Comcast filed a petition for waiver for three set-top box models: Motorola's DCT-700; Scientific-Atlanta's Explorer-940; and Pace Micro's Chicago set-top boxes. Many other waiver applicants sought and were granted relief for exactly the same boxes covered by the Comcast request. The basis for granting the waivers had nothing to do with the boxes – in each instance, the Bureau found the two-way functionality of these boxes to be too advanced to qualify as limited-capability devices. Instead, the Bureau orders used generic regulations in Sections 1.3 and 76.7 of the CFR to grant waivers based on certain characteristics of the operator – for instance, the operator's "demonstrated financial hardship," the operator's delivery of service to an area prone to natural disasters, or most often, the operator's commitment to migrate to an all-digital network before the digital transition date for broadcast television. We concur in this Order because of the inconsistent and arbitrary application of the waiver standard to applicants.

The policy objective of the 2005 Commission was to preserve a low-cost set-top box option for consumers, both for those who have analog TVs after the broadcast transition and for those who choose to try an economical digital cable service. The Commission intended these low-cost boxes to help cable's own digital transition, but did not intend to force cable companies to complete their digital transitions by the deadline set for the broadcast DTV transition. In the *2005 Deferral Order*, the Commission stated:

> [A]chieving consumer choice by establishing a competitive market should not displace a low-cost set-top box option for MVPD subscribers. It is critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets both during and after the transition. The availability of low-cost boxes will further the cable industry's migration to all-digital networks, thereby freeing up spectrum and increasing service offering such as high-definition television. Accordingly, as cable systems migrate to all-digital networks, we will also consider whether low-cost, limited capability boxes should be subject to the integration ban or whether cable operators should be permitted to offer such low-cost, limited capability boxes on an integrated basis.

This reasoning provides a sound basis for waivers, but does not offer a basis for treating the same boxes differently. Each box should either be exempted from the integration ban or not, based on its characteristics, not on how a particular operator is situated. Also, in our opinion, the reasoning fails to justify granting waivers on the basis of a commitment to complete the transition to ***digital cable*** by February 17, 2009, the deadline Congress set for ***broadcasters*** to transition to DTV.

We think the Bureau reached the correct result when it determined that the subject boxes, although low-cost, are not "limited-capability" boxes. Unfortunately, the Bureau orders did not stop at this analysis, but rather continued on to grant waivers for these boxes for certain applicants and not others. The result of these inconsistent decisions is that consumers will be treated differently, based on where they live and which MVPD they choose. This inconsistent application of the waiver policy does not further Congress' goal of promoting a national retail market for these devices.

Because Comcast's waiver request was not granted, the company will have to deploy more expensive boxes that contain separated security and likely will pass on this cost to its subscribers. Those who subscribe to a company whose waiver was granted will pay less for an integrated box, even though that box comes with the same functions and features as Comcast's. That result doesn't make sense -- for consumers, for MVPDs for the consumer electronics industry, or for the creation of the national retail market Congress intended.